Kentucky Law Journal

Volume 40 | Issue 2 Article 5

1951

Re-Examination of the Right of an Officer to Kill a Fleeing Suspected Felon

Delmer Ison
University of Kentucky

pedient that new principles corresponding with actual corporate practice be introduced. If the president is the chief executive officer of a corporation, the courts should take judicial notice of his status without the necessity of his authority being proven by one who has relied on it in an ordinary transaction with him. The highly complex business world of today has cast upon the president new and more extensive powers which the courts should recognize as being within an extended scope of authority In other words, when one's name is put on corporate stationery as its president, where an office at the principal place of business has his name on the door with the word "president" added, and where he appears to be something more than a mere figurehead, the public should be protected in dealing with him, at least as to the ordinary everyday business of the corporation.

CHARLES GROMLEY

RE-EXAMINATION OF THE RIGHT OF AN OFFICER TO KILL A FLEEING SUSPECTED FELON

The statement that an officer of the law is justified in killing a fleeing felon if it is otherwise impossible to prevent his escape appears frequently in the Kentucky decisions.[1] The question arises as to whether the decedent must have been a felon *in fact* in order to justify such a homicide. Another way of stating the question is, should an officer be justified in killing a fleeing innocent person or a mere misdemeanant on the officer's proof that he had reasonable cause to believe his victim was a felon? The issue may arise under two different circumstances: (1) where no felony has been committed, but the officer had reasonable grounds to believe that such a crime had been committed and that the fleeing person was the suspected felon; (2) where a felony in fact has been committed, but the officer mistook the fleeing person for the felon.

The question was treated at length in companion notes, previously published in the JOURNAL,[2] wherein opposing views were advocated and authority cited in support of the respective positions. It is felt that

[1] The view has been taken that to justify such a killing a major felony must have been committed. See 38 Ky. L.J. 619 (1950). However, this is not a subject for treatment herein. For an interesting discussion on the distinction between major and minor felonies, see Commonwealth v. Emmons, 157 Pa. Super. 495, 43 A. 2d 568 (1945).

[2] Notes, 38 Ky. L.J. 609 and 38 Ky. L.J. 618 (1950).

these companion notes represent an extensive research of the early cases and authority on the subject, and, therefore, it is believed that a further discussion of these early cases and authorities is unnecessary The case of *Petrie* v *Cartwright*,[3] decided in 1902, established the law in Kentucky to the effect that where no felony has in fact been committed, an officer cannot justify the killing of a fleeing innocent person or mere misdemeanant, however reasonable his belief might have been that his victim was a felon. The case of *Johnson* v *Williams Adm'r*,[4] decided in 1901, laid down the Kentucky law applicable to the circumstance where a felony has in fact been committed. The case held that to justify the killing, the officer must show not only that a felony had been committed, but also that his victim was the felon. The holdings of these two cases were not questioned in either of the above-mentioned companion notes on the subject.

Thus, inasmuch as the *Petrie* case and the *Johnson* case were the first cases to lay down the Kentucky view on these two issues, the discussion herein will be confined to case authority subsequent to these decisions, and the primary purpose will be to ascertain what the law in Kentucky is today in each instance. For purposes of convenience, the problem will be discussed separately under the above cases.

a. *Petrie* v *Cartwright.*

In the *Petrie* case the police officer had reasonable grounds to believe that a felony had been committed, and upon seeing decedent fleeing, shot and killed him. There had been no felony committed, and the court, in holding the officer liable on his bond, stated that the only way to justify the killing was to prove that a felony in fact had been committed. In recognition of its importance, the *Petrie* case was published in both the LAWYERS REPORTS ANNOTATED[5] and AMERICAN STATE REPORTS.[6] The Petrie case was reaffirmed by very strong dictum in 1915 in *Mylett's Adm'r* v *Burnley*,[7] where the court said:

> "However, an officer is not justified in killing one in order to effect his arrest or prevent his escape on mere suspicion that he has committed a felony. In such a case he acts at his peril, and can justify only on the ground that a felony has been committed."[8]

The latest Kentucky case on the subject is *Young* v *Amis*,[9] decided

---

[3] 114 Ky. 103, 70 S.W 279 (1902).
[4] 111 Ky. 289, 63 S.W 759 (1901).
59 L.R.A. 720.
[6] 102 Am. St. Rep. 274.
[7] 163 Ky. 277, 173 S.W 759 (1915).
[8] *Id.* at 280, 173 S.W at 760.
[9] 220 Ky. 484, 295 S.W 431 (1927). The fleeing person was wounded but did not die; nevertheless, the officer was held liable since no felony had been committed.

in 1927 There the *Petrie* case was explained at length and unequivocally approved. The precise issue in the *Petrie* case has not come before the Kentucky Court since the *Young* case.

The case of *Martin* v *Commonwealth*,[10] decided in 1935, has been thought by some to be authority for the proposition that Kentucky might be abandoning the view laid down in the *Petrie* case.[11] In the Martin case, the brother of the deceased was beating another person with steel knucks and the deceased was standing by protecting his brother with a gun.[12] The court said:

> "If Ola were using metallic knucks on Sid with malicious intent to wound or kill Sid, then Ola was committing a felony, and Orville, by using his pistol to protect Ola, shared in the commission of that felony."[13]

While the phrase, "If Ola were using metallic knucks with malicious intent to wound or kill .," might lead one to believe that the court was in doubt as to whether a felony had actually been committed, it is submitted that there was not only sufficient evidence to prove the commission of a felony, but that the court came to the conclusion that a felony had been committed, and thus the officer was justified in killing deceased.[14] However, in defining the officer s duty, the court said:

> "Martin had seen the fight and he certainly had reasonable grounds to believe a felony had been committed; then it became his duty, even without a warrant, to arrest the suspected felon. It then became the duty of Martin and the officers with him to use such force as was necessary to effect his arrest, and it was their duty not to allow him to escape, and when his escape appeared probable, these officers were authorized to kill him rather than let him escape, and the killing was justifiable. "[15]

Do these remarks by the court mean that an officer may fire upon a fleeing person on reasonable belief that the fleeing person is a felon, when in fact he is not and, further, no felony has in fact been committed? Such a rule would be directly contrary to the rule in the *Petrie* case. But the court, prior to these remarks, having concluded that felony had in fact been committed, makes these remarks something less than mere dictum. This language was unnecessary in deciding the case and serves only to mislead. Its use was very unfortunate.

---

[10] 257 Ky. 591, 78 S.W 2d 786 (1935).

[11] Note, 38 Ky. L.J. 618, at 622 (1950).

[12] The malicious beating of another with steel knucks is a felony. Perry v. Commonwealth, 286 Ky. 587, 151 S.W 2d 377 (1941).

[13] 257 Ky. 591, 592, 78 S.W 2d 786, 786 (1935).

[14] It might well be argued that whether or not Ola was using metallic knucks was a proper question of fact for the jury.

[15] 257 Ky. 591, 593, 78 S.W 2d 786, 786 (1935).

It might well be argued that since these remarks were made in the light of the fact that a felony had been committed, the court intended to lay down the rule that even where an officer believes that a felony has in fact been committed he should not fire unless his belief is a reasonable one. As a practical matter, under the rule of the *Petrie* case, inasmuch as the officer who fires upon a fleeing person does so at his peril if his victim is not a felon in fact, it is submitted that the officer should not only *reasonably believe* that the fleeing person was a felon, but, in fairness to himself, he should know that such was the case. The contention of the writer is that the court concluded that a felony was in fact committed in the *Martin* case, and thus the case is not contrary to the *Petrie* case.

The case of *Bailey* v *Commonwealth*[16] has been thought by some as having "taken this jurisdiction [Kentucky] entirely away from the view as expressed in *Petrie* v *Cartwright*."[17] In the Bailey case, the deceased requested the officers to arrest a certain person with whom he had been fighting. Deceased had been drinking. The officers refused and told him to get a warrant. He returned with a shotgun and demanded that the officers go with him. The officers asked him to lower his gun and went toward him to arrest and disarm him. He did lower the gun, but it discharged as he did so, striking one of the officers in the foot. He unbreached his gun and ran toward some parked cars, and before he reached the cars the officers fired upon and killed him. In commenting upon these facts, the Court said:

> "He fired first. The shot may or may not have been fired accidentallv. In either event Trusty had refused to surrender the gun upon the request of the officers; he had it cocked and pointed in their direction; and was backing away from them when it was discharged. He unbreached the gun and started running toward some parked cars. Under the circumstances it was not only their right but the duty of the officers to shoot Trusty if it became necessary to do so to take him into custody. They had every right to believe that Trusty intended to continue the affray from behind the parked cars. He did not surrender his gun and was preparing to reload it. The officers had not only the right to protect themselves, but the shooting having been committed in their presence it was their duty as peace officers to use whatever force they deemed necessary to take Trusty in custody."[18]

The cases of *Collins* v *Commonwealth*[19] and *Partin* v *Commonwealth*[20] were cited as authority for the rule above quoted. The facts in both cases were identical and the holdings were the same.

---

[16] 310 Ky. 731, 221 S.W 2d 693 (1949).
[17] Note, 38 Ky. L.J. 618, at 623 (1950).
[18] 310 Ky. 731, 733, 221 S.W 2d 693, 694 (1949).
[19] 192 Ky. 412, 233 S.W 896 (1921).
[20] 197 Ky. 840, 248 S.W 489 (1923).

For this reason, only the facts of the *Collins* case will be given. Deceased had committed a misdemeanor in that he was drunk in a public place. The officer, while in the course of effecting his arrest, was fired upon by the misdemeanant, whereupon the officer shot and killed him. In laying down the applicable rule of law where an officer is fired upon in the course of arresting a misdemeanant, the court stated:

> "The correct rule is that, where an officer is attempting to arrest one charged with a misdemeanor, and the one so charged resists arrest, and either *shoots* or *shoots at* [Italics Writer's] the officer, there is a felony committed in the presence of the officer, and he is then authorized to arrest the accused upon the felony charge without a warrant, and in making such arrest is given all the protection provided by law to officers in making felony arrests; and it is the duty of the officer in making such arrest to use such force as may be necessary to overcome such resistance, even to the taking of the life of the accused, and it matters not that the officer may not, at the time, be in danger of losing his life or limb at the hands of the accused."[21]

In the *Bailey* case, the deceased was guilty of a misdemeanor in that he was drunk and armed with a deadly weapon. The officer was fired upon while effecting the arrest. If it be argued that deceased did not *shoot* or *shoot at* the officer, the fact remains that the officer was shot. This fact cannot be lightly brushed aside. While the court's statement of facts leaves much to be desired, it is submitted that the court treated the case as though a felony had been committed. To strengthen the position that the court proceeded on the assumption that a felony had been committed, the cases of *Collins* and *Partin* are not without import. These cases were heavily relied upon by the court in support of its decision, and both involved the commission of felonies. One may disagree with the court in its conclusion that a felony had been committed, nevertheless, any criticism of law, which is the primary aim of this note, must be based upon the court's interpretation of the facts, and not on facts as they actually existed. It is readily seen that the court in the Bailey case was thinking in terms of self-defense when it used the phrase, "The officers had not only the right to protect themselves," and in terms of the right to kill to effect the arrest of a felon when it said, "but the shooting having been committed in their presence it was their duty as peace officers to use whatever force they deemed necessary to take Trusty in custody."

The court laid down the rule in the *Collins* and *Partin* cases that where a misdemeanant fires upon an officer who is attempting to arrest him, the officer is entitled to a self-defense instruction and also an in-

[21] 192 Ky. 412, 416, 233 S.W. 896, 898 (1921).

struction that an officer may kill a felon if necessary to effect his arrest. It is believed that the court was merely reaffirming this rule in the *Bailey* case.

While the *Bailey* case is right in result since a felony had been committed, and thus as a matter of law the officers had the right to kill if necessary to effect the arrest of the felon, it is submitted that the court erred in ruling as a matter of law that the officers were justified in killing deceased in self-defense. Clearly, this was a proper question of fact for the jury

Since a felony was committed in the Bailey case, no analogy can be drawn to even compare it with the *Petrie* case.

The argument has been made that since an officer has the right to arrest a suspected felon on reasonable suspicion, he should likewise be permitted to fire upon a fleeing suspected felon on reasonable suspicion. The fallacy of this argument is quite apparent. In the case of mistaken arrest, only the freedom of movement has been impaired. The infringement on the person's liberty is reparable. However, when the infringement is upon life itself, no reparation is possible. An action for wrongful death falls far short of restitution. There is no way in which the victim can be made whole again.

Unquestionably the case of *Petrie* v *Cartwright* remains the unshaken law of Kentucky today, with all of its import. It is believed to be a sound view It lays down a rule of law which reaffirms the right of every person to live without fear of becoming the victim of a circumstance for which he was not responsible.

b. *Johnson* v *Williams Admr*

In the Kentucky case of *Johnson* v *Williams Admr*, the officers had a warrant for the arrest of Dave Browder, for murder. They set a trap for his capture, but an innocent person was mistaken for Browder and was killed by one of the officers. The court, in holding the officer liable, said:

> "The law which gives an officer the right to kill an escaping felon certainly requires him to know that he is the felon, not an innocent party, whose life he is attempting to take."[22]

The *Johnson* case is not only a landmark case in the Kentucky law, but it has been given broad recognition in other jurisdictions. The case was published in the LAWYERS REPORTS ANNOTATED[23] and AMERICAN STATE REPORTS.[24] A parallel factual situation was again presented

[22] Johnson v. Williams Admr, 111 Ky. 289, 297, 63 S.W 759, 761 (1901).
[23] 54 L.R.A. 220.
[24] 98 Am. St. Rep. 416.

to the Kentucky appellate court in the case of *Watson* v *Commonwealth*,[25] decided in 1936. There, in reaffirming the rule laid down in the *Johnson* case, and with specific reference to it, the court said:

> "That case was published in 54 L.R.A. as well as in 98 Am. St. Rep., and it is cited in many later texts upon the question, written since that case was decided. We have searched all available sources and have found no adjudication or text statement contradicting that excerpt. It was bottomed upon our then conclusion, and which we now approve, to the effect that a modification of that rule whereby an arresting officer in the circumstances might excuse himself from the consequences of such mistaken identity would be an extremely dangerous one and could easily be employed to shield and protect him from any revengeful action that he might take toward the injured person and be relieved of the consequences thereof."[26]

If an officer with a warrant for a felon, as was the situation in both the *Johnson* and *Watson* cases, cannot justify the killing of an innocent person based on reasonable grounds that his victim was the felon, by the stronger reason he should not be permitted to justify killing when acting without a warrant. It is submitted that the Kentucky Court has laid down a sound rule, supported by sound reasoning and authority If an officer were permitted to justify the killing of an innocent person on the mere grounds that a felony had been committed and he had reasonable grounds to believe that his victim was the felon, any reasonably suspected person, however innocent, could became a lawful victim.

In conclusion, it should be noted that the rules laid down in the *Petrie* and *Johnson* cases are invoked primarily for the protection of innocent persons and society as a whole. The very basis of the common law rule, allowing an officer to take the life of a fleeing felon, rested on the theory that since all felonies were punishable by death, then if only the life of a felon had been forfeited, no net harm had been done.[27] This reasoning lends support to the suggestion that it is not so much whether a felony has been committed as it is whether the person is the one who committed it, and thus subject to be killed if he attempts to escape. It is, therefore, not a question of finding a justification for the officer, by showing that he acted reasonably, but

---

[25] 263 Ky. 72, 91 S.W 2d 1018 (1936).

[26] *Id* at 79, 91 S.W 2d at 1021.

[27] "With the coming of statutory provisions doing away with the death penalty for felonies, the tendency should logically be to restrict officers to the right to kill to cases of felonies punishable capitally." Note, 38 KY. L.J. 609, 616 (1950).

Whether or not the fleeing person is a felon should no longer be the test, since all felonies are not punishable by death. The officer should be limited to killing a fleeing person only when such person is guilty of having committed a major felony which normally causes or threatens death or serious bodily harm. The Restatement of Torts subscribes to this view. RESTATEMENT, TORTS, SEC. 131.

the question is, was the deceased guilty of having committed a felony, which would justify the surrender of his own life? Thus, the question of justification of the officer should be addressed to the innocence or guilt of his victim, and not to whether the officer acted reasonably

The primary objection to permitting an officer to kill on his reasonable belief that his victim was a felon is the abuse which would result from such a rule. The officer could always show that he had reasonable grounds to suspect the commission of a felony and that he had reasonable grounds to believe his victim was the felon, and it would in effect be left entirely to him to say whether he was proceeding against a misdemeanant or a felon. Such a principle would not only be in derogation of the common law rule permitting an officer to kill a fleeing felon *only,* but would virtually give an officer the right to fire upon anyone who flees in the course of an attempted arrest. A law that will permit of such abuse in its enforcement would result in more evil than good, and must necessarily be rejected in any society [28]

It has been argued that if officers were permitted to fire upon fleeing suspected felons, criminals would more readily submit to the law enforcement officials. The writer questions the soundness of this argument. The average criminal has little knowledge of the law with all of its ramifications. Consequently the precise provisions of the law have little effect on the criminal's submission to it. On the other hand, if the law were extended to permit an officer to kill on reasonable suspicion, it would definitely open wider the avenues to abuse by officers, while having practically no effect as a deterrent for preventing criminals from fleeing.

The rules laid down in the *Petrie* and *Johnson* cases conform to the above reasoning, and leave no doubt as to what the present state of the law is in Kentucky An officer, before firing upon a fleeing person, had better know, not only that a felony has been committed, but that the fleeing person is the felon.

DELMER ISON

---

[28] "The sacredness of human life is so great that an officer should resort to killing only when to let the felon escape would potentially cause grave harm to society. With this limitation, an officer would not have occasion to kill for any crime less than felony. In the event there is doubt as to whether or not a felony has been committed, it is submitted that the crime will not have been committed with such violence as to warrant the taking of life. Where a felony has been committed and there is the slightest doubt as to the guilt of the suspected felon, it is submitted that society will suffer less by the temporary escape of the suspect, even if guilty, than it would by killing him and thereby incurring the risk of killing an innocent person. The placing of these restrictions on an officer would not do violence to the generally recognized rule that an officer, in order to justify killing one fleeing in the course of arrest, must prove that the person killed was a felon, but it would have the important effect of discouraging the taking of life in the absence of absolute necessity." Note, 38 KY. L.J. 609, 617 (1950).